SEP 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 71-1512

TERRY BROWN, ARLENE CIRELLI, PATRICK O'HEARN, and BOB YOUNG,

Petitioners,

—v.—

NEW MEXICO *ex rel.* A. L. HAPPY APODACA, A. L. HAPPY APODACA, DAVID L. NORVELL, Attorney General of the State of New Mexico, and BETTY FIORINA, Secretary of State of the State of New Mexico,

Respondents.

SUPPLEMENTAL BRIEF FOR PETITIONERS

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Earlier this year, the respondents in this case filed a supplemental brief contending that by virtue of intervening circumstances, namely the enactment of new legislation, the case had been rendered moot. Without conceding that the issues had been rendered moot by the statutory changes, the petitioners filed a supplemental brief in July, 1973, suggesting that the judgment below be vacated and the matter be remanded for consideration of the mootness issue. For the following reasons, we now modify that suggestion and urge instead that this court grant certiorari in this case, note jurisdiction in the companion case (No. 71-1511) and resolve the issues on the merits.

When our earlier Supplemental Brief was filed, counsel's attention was primarily focused on the effect of the statutory changes on the claims of the petitioners—candidates

and their supporters, who were unable to pay the filing fees previously required, and who had been denied the right to participate in the New Mexico Supreme Court mandamus proceedings below.

In the course of the petitioners' Supplemental Brief, it was also suggested that a remand would be appropriate in the companion case, *Norvell* v. *New Mexico ex rel. Apodada*, No. 71-1511. However, because of certain facts, some of which have only recently come to counsel's attention, this suggestion was in error.

No. 71-1511 is the appeal from the New Mexico Supreme Court ruling which upheld the constitutionality of the then existing statutory filing fee. The judgment of the New Mexico Supreme Court purports to bind all persons seeking electoral office through the primary system, and is not limited to those persons who were parties to the mandamus action. Indeed, although the only parties to the mandamus action were Apodada, as petitioner, and Norvell and Fiorina, as respondents, the Supreme Court of New Mexico undertook to adjudicate the constitutionality of the filing fee system as applied to every potential candidate. Even those candidates who sought to intervene, after the extremely short notice afforded by the Court, were precluded from participating in the litigation, although their right to run for political office was directly affected by any decision rendered by the state tribunal.[1]

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[1] The Supreme Court of New Mexico waived its own rules requiring ten days' notice to answer in a mandamus action and further ruled that the candidates themselves were not indispensable parties or, in the language of the rule, persons "directly affected" by the litigation, although the ultimate decision would perforce determine their right to run for political office. See 21-2-1 (24) (1) and (3), N.M.S.A., 1953 Comp.

As a consequence of the New Mexico Supreme Court decision, during the primary election various of the candidates paid the filing fee under protest. These monies have been segregated by the Secretary of State, pending this Court's decision in these cases. At least one of those candidates, Peter Gallagher, a candidate for the Democratic nomination to the State Supreme Court, brought suit in federal court seeking to recover the monies so paid. *Brown, et al. v. Fiorina,* United States district court for the district of New Mexico (No. 9418). Although an amended complaint was very recently dismissed on procedural grounds, without prejudice, a new action will be filed.

Accordingly, the existence of candidates for primary nomination, who have paid the filing fee under protest, but who are bound by the terms of the mandamus judgment that the filing fee statutes are constitutional, clearly presents an immediate and bona fide controversy over the validity of the repealed filing fee statutory scheme. If the filing fee system existent in New Mexico at the time the judgment of the Supreme Court of New Mexico was rendered is unconstitutional, then it is invalid as to all candidates for office and not just those who were financially unable to pay the fees. Indeed, as is shown by its opinion, the Supreme Court was presented with the possibility that the filing fee statutes should be construed to apply only to persons financially able to pay the filing fee and not to indigent persons, thus saving its constitutionality under the Fourteenth Amendment. The Supreme Court of New Mexico clearly rejected this construction of the filing fee requirements and held that they applied to persons both able and unable to pay the fee. Since the highest court of the state has construed the statute in question to apply to all candidates irrespec-

tive of their financial status, the statute must be sustained or must fall accordingly. If the statute is unconstitutional under the Fourteenth Amendment by reason of its impact on the impecunious candidate, then it is invalid as to every candidate irrespective of his personal wealth or ability to meet the fee. See, *e.g.*, *Sugarman* v. *Dougall*, —— U.S. ——, 41 U.S. Law Week 5138 (June 25, 1973).

Under traditional principles of constitutional adjudication, a case is not rendered moot so long as the decision appealed from "continues to play a substantial role in the response of officials" to the actions of the persons bound by it. See *Carroll* v. *President and Commissioners*, 393 U.S. 175, 178-179 (1968). Similarly, where the decision of the lower court may "be the basis of further proceedings", the controversy is not mooted. *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). In the case at bar, the decision of the Secretary of State to return to the candidates the monies paid under protest will admittedly be governed by the decision of the United States Supreme Court in the case at bar. That is precisely why she has kept these monies in a suspense account pending the outcome of this litigation. Further, the decision of the New Mexico Supreme Court is the subject of further action in the United States District Court for the District of New Mexico to secure the return of the monies paid under protest by at least one candidate.

Finally, the case at bar presents a unique opportunity for the United States Supreme Court to determine the validity of a filing fee statute in light of an election held, in part, with no filing fee. The primary elections in New Mexico in 1972 were held pursuant to the filing fee statute except for the office of United States Senate. The United

States District Court for the District of New Mexico had held in a prior decision that the filing fee statutes were unconstitutional with respect to that office and ordered that no filing fees be collected for any candidates seeking that office.[2] Accordingly, this Court would have an opportunity to review the various contentions in support of filing fees—i.e., that filing fee requirements insure strong pluralities, etc.—in light of the actual election returns for the one office for which no filing fee was required, and determine their validity by reference to empirical evidence otherwise unavailable to it.

For this reason, the existence of candidates paying the fee under protest and of a segregated fund holding such monies clearly maintains a justiciable controversy which is not and can not be rendered moot by subsequent repeal of the unconstitutional statute. Various candidates have a direct financial interest in these funds, the return of which is dependent on the validity or invalidity of the Supreme Court of New Mexico's judgment. Accordingly, contrary to our prior suggestion, this case should not be vacated and remanded due to the repeal of the statute in question, and this Court should decide on the merits the issues presented herein, and in No. 71-1511.

[2] The only plaintiffs to the prior federal suit were candidates for the United States Senate and the decision of the court invalidating the fees was accordingly limited.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted in this case, and jurisdiction should be noted in No. 71-1511.

Respectfully submitted,

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